

MARCIA A. MORRISSEY  
Law Office of Marcia A. Morrissey  
11400 W. Olympic Blvd., Suite 1500  
Los Angeles, CA 90065  
Telephone: 310-399-3259  
Email: [morrisseyma@aol.com](mailto:morrisseyma@aol.com)

DONOVAN ASAO ODO  
Law Office of Donovan A. Odo LLC  
P.O. Box 939  
Aiea, HI 96701  
Telephone: 808-554-3490  
Email: [donovan.a.odo@gmail.com](mailto:donovan.a.odo@gmail.com)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DELIA FABRO-MISKE (12),

Defendant.

Cr. No. 1-19-CR-00099 DJK-KJM

DELIA FABRO-MISKE'S MOTION  
IN LIMINE NO. 9 RE:  
INSTRUCTION THAT MERE  
EMPLOYMENT BY OR  
ASSOCIATION WITH MICHAEL  
MISKE IS NOT ILLEGAL AND  
IS NOT THE EQUIVALENT OF  
BEING GUILTY OF ANY CRIME  
CHARGED IN THIS CASE

**I. Introduction**

This case is not about employment by or familial association with Michael  
J. Miske, Jr., or how employment or familial association is indicative of criminal

intent or involvement in charged criminal activity. Jurors need to be clear on that. Put another way, it would be incorrect for jurors to be of the viewpoint that it is illegal for a person to be employed by or related to Mr. Miske, even if the indictment alleges the existence of a “Miske enterprise.” Employment by or association with Mr. Miske is not evidence that Delia Fabro-Miske is guilty of a crime, is of bad character, or is a conspirator. This motion asks the Court apply the law as determined by the United States Supreme Court and interpreted by other courts and instruct jurors accordingly.

## **II. Authority and Argument**

In *United States v. Abel*, 469 U.S. 45, 48-49 (1984), the Supreme Court explained that a person cannot be convicted for ‘merely belonging to an organization that advocates illegal activity,’ relying in part on its ruling in *Scales v. United States*, 367 U.S. 203 (1961). In several cases, the Ninth Circuit has addressed the issue of concern here, i.e., the risk that an individual may be convicted based on the notion that he or she is a member of a “gang” or associates with a “gang.” One instructive decision is *Unites States v. Rubio*, 427 F. 2d 786, 791-93 (9th Cir. 1983), a case in which the notion of a linkage between individuals and a motorcycle gang, as well as the symbols of that gang, was not in itself direct proof of criminal activity for the purposes of establishing probable

cause.

Mere employment by or association with the alleged “Miske enterprise” in itself is not a violation of a federal statute. Jurors in this case will need to be very clear about that. *United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991), is instructive on the problems of allowing unconstrained comment on mere association. *Roark* involved allegations that a group of persons - all members of the Hells Angels - were involved in the production of methamphetamine. The Eighth Circuit reviewed the record and concluded that the difficulty was essentially that the accused was tried on the basis of evidence of his “. . . unsavory character merely to show that he is a bad person and thus more likely to have committed the crime." *Id.*, at 1434. The Court further commented that the trial judge faced the issue of the government improperly injecting the Hells Angels Motorcycle Club into the case, virtually as an uncharged defendant. *Id.*, at 134-35. It also expressed concern about the lack of a timely limiting instruction, the government's ignoring of the appropriate instruction, and the “haranguing” of the jury about the alleged institutional criminality of the Hells Angels Club. *Id.*

As stated by the Ninth Circuit: "Evidence of gang membership may not be introduced, as it was here, to prove intent or culpability." *Kennedy v. Lockyer*, 379 F.3d 13 1041, 1055-56 (9th Cir. 2004), relying in part on *United States v. Garcia*,

151 F.3d 1243, 1244-46 (9th Cir.1998). *Kennedy* also references the court's opinion in *United States v. Hankey*, 203 F. 3d 1160, 1170 (9<sup>th</sup> Cir. 2000), where it expressed concern that gang membership ". . . creates a risk that the jury will [probably] equate gang membership with the charged crimes."

This Court should instruct the jury that employment by or association with Michael Miske, Jr., and the so-called "Miske enterprise" is not illegal *per se*, and is not evidence of a crime, including the RICO conspiracy charged in Count I.

The government should also be precluded from referring to what is alleged in the indictment as the "Miske enterprise" as such. Based on the RICO allegations in this case, the term "enterprise" has a specific legal definition, and is in and of itself an inflammatory appellation that carries an unfairly prejudicial connotation. One example of a useful discussion of this issue is the Seventh Circuit's decision in *United States v. Irwin*, 87 F.3d 860, 866 (7<sup>th</sup> Cir. 1996).

There, the conviction of one of the defendants was reversed, in part because of the prosecutor's statements during the trial and closing argument that "consistently" used the term "motorcycle gang." *Id.* The Court observed that the prosecutor: "specifically choos[e] [the term "motorcycle gang"] over the far less prejudicial term "motorcycle club," even after the judge instructed him to refrain from using the term "gang." In addition, the government openly mocked the use of the term

"club" in his questions, clearly suggesting to the jury that the term was a total misnomer for a gang. Most importantly, the prosecutor essentially asked the jury to associate criminal activity with the gang and to draw the improper inference of guilt by association." *Id.* *Irwin* is not a RICO case, but its discussion of this issue is relevant especially where, as here, Ms. Fabro-Miske was employed by and related to Mr. Miske. The risk of unfair prejudice as to her on the issue of "guilt by association" is especially serious.

This Court should exclude these sorts of unfairly prejudicial references, for, as the Seventh Circuit explained, such highly charged terms cannot and must not be used as a substitute for direct evidence, leading to convictions based purely on guilt by association.

Dated: November 13, 2023

Respectfully submitted,  
/s/ Marcia A. Morrissey  
MARCIA A. MORRISSEY

/s/ Donovan A. Odo  
DONOVAN A. ODO

Attorneys for Defendant  
DELIA FABRO-MISKE

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was electronically served through CM/ECF on the following on November 13, 2023:

MICHAEL D. NAMMAR, ESQ.	michael.nammar@usdoj.gov
MARK A. INCIONG, ESQ.	mark.inciong@usdoj.gov
W. KEAUPUNI AKINS	KeAupuni.Aking@usdoj.gov
LYNN E. PANAGAKOS, ESQ.	lynnpanagakos@yahoo.com
MICHAEL J. KENNEDY, ESQ.	michael@mjkennedylaw.com
WALTER J. RODBY, ESQ.	attorneyrodby@msn.com
TERRI L. FUJIOKA-LILLEY, ESQ.	terri@bflwlaw.com
WILLIAM L. SHIPLEY, JR., ESQ.	808Shipleylaw@gmail.com

DATED: November 13, 2023.

/s/ Marcia A. Morrissey  
Marcia A. Morrissey

Attorney for Defendant  
Delia Fabro-Miske